INTERIM POLICY ON
SUPPLEMENTAL ENVIRONMENTAL PROJECTS

POLICY ENF-97.005

I. INTRODUCTION

A. PURPOSE AND INTENT

In settlement of environmental enforcement cases, the Massachusetts Department of Environmental Protection (DEP) will require regulated entities to achieve and maintain compliance with the environmental laws and regulations administered by DEP, and may require them to pay an administrative penalty. Penalties play an important role in environmental protection by deterring violations and ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply in a timely manner.

The performance of environmentally beneficial projects, or supplemental environmental projects (SEPs), can play an additional role in furthering DEP's goals to protect public health, safety and welfare, and the environment. SEPs may be particularly appropriate to further the objectives in the statutes administered by DEP, and to achieve other policy goals, including the promotion of pollution prevention and environmental justice.

In certain enforcement cases, SEPs may be included as an appropriate condition of settlement, and, as such, may be considered as a factor in mitigating a penalty.

When a SEP is proposed as a settlement term, this policy establishes a framework for DEP to use when exercising its enforcement discretion in applying its enforcement authority. **Whether DEP decides to accept a proposed SEP as part of a settlement is purely within DEP's discretion.** In some cases, even though a project appears to satisfy all of the provisions of this

policy, application of this policy may not be appropriate, in whole or in part (e.g., the cost of reviewing a SEP proposal is excessive, the oversight costs of the SEP may be too high, or the regulated entity may not have the ability or reliability to complete the proposed SEP).

This policy is also intended to enhance consistency in how DEP exercises its enforcement discretion in cases in which a SEP is proposed as a condition of settlement. The policy sets forth the types of projects that may be legally permissible as a SEP, the terms and conditions under which a SEP may become part of a settlement, and how DEP may determine the appropriate degree of penalty mitigation for performance of a SEP.

Although DEP supports the use of SEPs, and encourages regulated entities to propose acceptable SEPs during settlement, **DEP will not propose specific SEPs**. DEP may provide a listing of previously-approved SEPs as a guide for regulated entities in proposing projects for DEP approval.

B. APPLICABILITY

This policy supplements the 1997 Enforcement Response Guidance (ERG), and should be read in conjunction with it.

This policy applies to settlements of administrative actions commenced after the effective date of this policy, April 26, 1997, and to all pending administrative cases in which DEP has not reached agreement in principle with the regulated entity on the specific terms of settlement.

This policy does not apply to settlements of claims for stipulated or suspended penalties for violations of consent orders or other settlement agreement requirements.

As a settlement policy, it is not intended for use by DEP, regulated entities or administrative law judges at a hearing or in a trial.

Since a primary purpose of this policy is to obtain public health or environmental benefits that may not otherwise have occurred outside the terms of the settlement, projects which have been authorized by the regulated entity before DEP has identified a violation are not eligible as SEPs.

M.G.L. Chapter 21A, Section 16 and 310 CMR 5.25 require DEP to consider a number of criteria in determining the appropriate amount of an administrative penalty, including:

1) whether the regulated entity took steps to prevent the noncompliance;

2) whether the regulated entity took steps to return to compliance promptly;

3) whether the regulated entity took steps to remedy and mitigate whatever harm resulted from the noncompliance;

4) the economic benefit associated with the noncompliance;

5) financial condition of the regulated entity; and

6) the public interest at stake in assessing a penalty.

DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001) describe steps taken in the first three factors above as evidence of the existence of good faith which may be used to mitigate a penalty. DEP considers performance of a SEP as additional evidence of good faith which may also result in mitigating a penalty. In addition, DEP considers mitigation of a penalty for performance of a SEP as being in the public interest. However, DEP will consider a SEP as a mitigating factor only when a regulated entity first demonstrates that it:

1) has the financial ability to correct all noncompliance; and

2) either has remediated any harm it caused, is capable of completing future remedial work, or is in current compliance with the requirements of M.G.L. c. 21E and/or other remedial requirements.

If a regulated entity claims that payment of any penalty or the performance of a SEP will impede its ability to comply or perform a remedial measure, **DEP will not consider mitigating the penalty through performance of a SEP**. Instead, DEP may mitigate the penalty on the basis of other penalty mitigation policies or factors required to be considered pursuant to M.G.L. Chapter 21A, Section 16. Also, if a regulated entity demonstrates an inability to pay a full appropriate penalty, DEP may offer an alternative payment plan, as that term is defined in ERG Section II, to collect

full or partial payment, or may consider suspending or waiving the penalty.

This policy does not apply to an administrative consent order into which DEP may enter as part of a plea agreement reached between the Commonwealth and a defendant being prosecuted criminally for environmental crimes.

C. ENVIRONMENTAL MANAGEMENT HIERARCHY

DEP recognizes an environmental management hierarchy, in order of preference, by: resource conservation, pollution prevention or source reduction, recycling, treatment, disposal.

Selection and evaluation of proposed SEPs should be conducted in accordance with this hierarchy with preference being given to resource preservation, conservation and restoration, pollution prevention techniques over other types of reduction or control strategies.

D. ENVIRONMENTAL JUSTICE

There is a concern that certain segments of the Commonwealth's population are disproportionately burdened by pollutant exposure. Emphasizing SEPs in communities where environmental justice issues are present helps to ensure that persons who spend significant portions of their time in areas, or depend on food and water sources located near where the violations occur would be protected. Environmental justice is an overarching goal, and not a specific technique or process. It is, therefore, not listed as a category of SEP. DEP, however, especially encourages SEPs in communities where environmental justice may be an issue, provided that there exists an adequate nexus between the violations and the project as required in Section III.

II. DEFINITIONS

For the purposes of this policy, the following definitions apply. Some terms used in the policy may also be more fully defined in ERG Section II.

"Calculation Guidance" refers to the DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001).

"Economic Benefit" refers to an adjustment factor that M.G.L. Chapter 21A, Section 16 and 310 CMR 5.00 require DEP to consider in calculating the amount of an administrative penalty. DEP Guidelines for Calculating Administrative Penalties, (POLICY ENF-90.001) provide that economic benefit should be calculated and added to the gravity based penalty whenever there is an indication that noncompliance resulted in delayed compliance costs, avoided compliance costs, and/or profits from unlawful activity.

"Penalty exposure" refers to the maximum potential penalty amount, **prior to making any downward adjustments** based on mitigating factors, for which a regulated entity is potentially liable and is based **solely** on the gravity of the violations. Penalty exposure includes upward adjustments made to the base number on the basis of:

* the actual and potential impact of the violations;

* the actual or potential costs incurred, and actual and potential damages suffered, by the Commonwealth;

* the duration of the noncompliance; and

* the extent to which the regulated entity deviated from requirements.

Penalty exposure does not otherwise reflect any considerations specific to the regulated entity in a particular case which may result in mitigating the penalty.

"Punitive penalty" is that portion of an administrative penalty which reflects the gravity of the violations, duration of noncompliance, behavior and financial condition of the regulated entity and other relevant public interest considerations. A punitive penalty includes adjustments from the base number, as described in the DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001), on the basis of:

* the actual and potential impact of the violations;

* the actual or potential costs incurred, and actual and potential damages suffered, by the Commonwealth;

* multiple days of occurrence;

* existence or lack of good faith;

* financial condition of the regulated entity; and

* any other relevant public interest considerations.

[NOTE: Punitive penalty does not include that portion of the penalty representing the regulated entity's economic benefit or gain from noncompliance. Also, punitive penalties do not include Natural Resource Damages recoverable pursuant to M.G.L. Chapter 21E or CERCLA.**]**

"Stipulated Penalty" is a settlement provision in which a regulated entity agrees to pay a predetermined penalty amount for each violation of specified requirements in the event that the requirements are violated in the future. A stipulated penalty, which sets a predetermined penalty amount for **future noncompliance**, should not be confused with a suspended penalty for **past noncompliance**, payment of which may be triggered by future noncompliance.

"Supplemental Environmental Projects" **(SEPs)** are environmentally beneficial projects which a regulated entity agrees to undertake, or to cause to be undertaken, in settlement of an enforcement action, but which the regulated entity is not otherwise legally required to perform.

1. "Environmentally beneficial" means a SEP must improve, protect or reduce risks to public health, safety or welfare, or the environment at large. While in some cases a SEP may provide the regulated entity with certain benefits, the project must primarily benefit the public health, safety, or welfare, or the environment.

2. "In settlement of an enforcement action" means: 1) DEP has the opportunity to help shape the scope of the project before it is implemented; and 2) the project is not commenced until after DEP has identified a violation.

3. "Not otherwise legally required to perform" means the SEP is not required by any federal, state or local law or regulation. Further, SEPs cannot include actions which the regulated entity may already be required to perform: as injunctive relief in the instant case; as part of a settlement order in another legal action; as a result of any contractural obligation, by state or local license or permit, or other state or local requirements. SEPs may include activities which the regulated entity will become legally obligated to undertake two or more years in the future. Such "accelerated compliance" projects may not include remedial actions taken

pursuant to M.G.L. Chapter 21E or projects for which a regulation or statute provides a benefit (e.g., a higher emission limit) to the regulated entity for early compliance.

III. LEGAL GUIDELINES FOR ENFORCEABLE SEPS

DEP has broad authority and discretion to settle enforcement cases, including the discretion to include a SEP as an appropriate part of a settlement. The legal evaluation of whether a specific SEP is within DEP's authority to enforce, and consistent with all Constitutional and statutory requirements is often a complex task.

Accordingly, this policy uses the following legal guidelines to ensure that all SEPs proposed in mitigation of a penalty do not run afoul of any Constitutional or statutory requirements. The legal guidelines describe the relationships that must exist, in order for DEP to consider a proposed SEP as a penalty mitigation factor, between: noncompliance being remedied and the proposed SEP; the regulated entity and its proposed SEP; and DEP and the proposed SEP.

1. All SEPs must have <u>adequate nexus</u>. Nexus is the relationship between the noncompliance and the proposed project. This relationship exists if the proposed SEP:

   a) advances at least one of the declared objectives of the environmental statutes that form the basis of the enforcement action although a SEP can neither be inconsistent with, nor reduce the stringency or timeliness of requirements of environmental statutes and regulations; and either

   b) remediates or reduces the actual or probable overall environmental or public health impacts or risks to which the violation at issue contributes within the immediate geographic area, the same ecosystem, watershed or economic target area; or

   c) is designed to reduce the likelihood that similar violations will occur in the future at the site where the noncompliance occurred, at a different site(s) operated by the regulated entity, or within industrial sectors subject to the same regulatory program requirements which the regulated entity violated.

2. The type and scope of each project are determined solely within the signed consent order. The "what, where and when" of a project are defined as specifically as possible as enforceable conditions of the consent order. Settlements in which the regulated entity agrees to spend a certain sum of money on a project(s) to be determined after DEP signs the consent order are generally not allowed.

3. Since the terms of a consent order are legally binding only on the regulated entity, a SEP must be performed either by the regulated entity itself (using its own employees) and/or by its by contractors or consultants. Non-profit organizations, such as universities and public interest groups, may function as contractors or consultants. Because of legal concerns and the difficulty of ensuring that a third party implements the project as required, **performance of a SEP by a third party who does not have an enforceable agreement with the regulated entity is not allowed**.

4. DEP must play a limited role relative to performance of the SEP. DEP's role may be sufficiently limited where:

a) DEP plays no role in managing or otherwise administering funds that may be set aside or escrowed for performance of a SEP;

b) DEP neither manages nor administers the SEP although DEP retains regulatory authority to oversee a project, ensure that it is implemented pursuant to the provisions of a consent order, and establish a basis for legal recourse if the project is not adequately performed;

c) A SEP is not something that DEP itself is required by its statutes to do except where DEP is enabled as a matter of last resort;

d) A SEP neither provides DEP with additional resources to perform an activity for which public funds are specifically appropriated, nor appears to be an expansion of an existing program administered by DEP.

IV. CATEGORIES OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

A. POLLUTION PREVENTION

A pollution prevention project is one which reduces the generation of pollution through "source reduction," i.e., any practice which reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment or disposal. (After the pollutant or waste stream has been generated, pollution prevention is no longer possible and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods.)

A pollution prevention project under this policy will encompass protection of ecosystems for their full range of values including flood prevention, wildlife habitat, and recreation as well as water quality protection and enhancement.

A pollution prevention project may include a pollution prevention assessment which is a systematic, internal review of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes. Such assessments may be eligible as SEPs only if:

* the assessment is not otherwise legally required;

* the assessment is performed by an independent third-party;

* the primary impact of the project is at the same facility, at another facility owned by the regulated entity within Massachusetts, or in the same industrial sector as the regulated entity within Massachusetts;

* the regulated entity agrees, within a consent order, to provide DEP with a copy of the assessment, and to promptly and fully disclose, and expeditiously correct all violations or conditions contributing to violations discovered in the course of the assessment according to timeframes specified in the consent order; and

* the assessment is conducted using a recognized pollution prevention or waste minimization procedure to reduce the

likelihood of future violations, and not otherwise be required under the Toxics Use Reduction Act, M.G.L. Chapter 21I.

DEP strongly encourages the implementation of recommendations that result from an assessment. However, a regulated entity may perform an assessment as a SEP without an implementation commitment. For the purpose of determining the SEP Cost, credit is given only for the costs associated with conducting the assessment since calculating costs prior to requirements being known is difficult.

B. POLLUTION REDUCTION

If the pollutant or waste stream already has been generated or released, a pollution reduction approach may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream, water resource or otherwise being released into the environment by an operating business or facility beyond a level required by law, regulation, license, permit or other approval, and by a means which does not qualify as "pollution prevention." This may include the installation of more effective end-of-process control or treatment technology. This also includes "out-of-process recycling," wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site, reducing the need for treatment, disposal, or consumption of energy or natural resources.

C. ENVIRONMENTAL CONSERVATION, PROTECTION AND RESTORATION

An environmental conservation, protection and restoration project is one which goes beyond repairing damage caused by the violation to conserving, protecting and enhancing the condition of the immediate geographic area, ecosystem, or watershed adversely affected. If, however, DEP lacks authority to require repair, then repair itself may constitute a SEP.

These projects may be used to protect or restore natural environments, such as ecosystems or watersheds, and to retrofit or reduce the environmental impact of man-made environments, such as facilities and buildings. Projects in this category may include, but are not limited to installation of, or retrofitting facilities

with, best management practices (BMPs), water conservation projects, land purchase and donation, creation of conservation easements, wetlands restoration projects, and remedial actions conducted pursuant to M.G.L. Chapter 21E provided that the regulated entity is not otherwise legally required to conduct such activities.

Projects in this category may also include site assessments which are investigations of the condition of the environment at, or impacted by a site or facility, and/or investigations of threats to human health or the environment relating to a site or facility. Such assessments are eligible as SEPs only if:

* the assessment is not otherwise legally required;

* the assessment is performed by an independent third-party;

* the assessment is conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken.

* the primary impact of the project is at the same facility, at another facility owned by the regulated entity within Massachusetts, or in the ecosystem, watershed or the immediate geographic area within which the facility is located; and

* the regulated entity agrees, within a consent order, to provide DEP with a copy of the assessment, and to promptly and fully disclose, and expeditiously correct all violations or conditions contributing to violations discovered in the course of the assessment according to timeframes specified in the consent order.

DEP strongly encourages the implementation of recommendations that result from an assessment. However, a regulated entity may perform an assessment as a SEP without an implementation commitment. For the purpose of determining the SEP Cost, credit is given only for the costs associated with conducting the assessment since calculating costs prior to requirements being known is difficult.

D. EMERGENCY PLANNING AND PREPAREDNESS

An emergency planning and preparedness project provides assistance to a responsible state or local emergency response or planning entity, other than DEP. This is to enable these organizations to fulfill their obligations under federal, state and local laws, to:

* collect information to assess environmental hazards within their jurisdiction;

* develop emergency response plans;

* have proper equipment and supplies on hand to respond to releases of oil and hazardous materials; and

* train emergency response personnel to improve response to environmental hazards, including, but not limited to hazardous chemical spills at facilities within the jurisdiction, and flood and navigational hazards resulting from inappropriate construction or development.

Emergency planning and preparedness SEPs are intended to enable local communities to plan and respond more effectively to environmental hazards, and inform potentially affected citizens of the risks present in their communities, thereby enabling them to protect the public health, safety and welfare and the environment which could be threatened. Such SEPs are acceptable where the primary impact of the project is within the same emergency planning district affected by the violations. Projects in this SEP category may include non-cash assistance such as computers and software, communications systems, chemical emission detection and inactivation equipment, emergency equipment or training. Projects may also involve cash assistance, provided that the donation is dedicated to a specific type of emergency assistance.

E. ENVIRONMENTAL COMPLIANCE PROMOTION

An environmental compliance promotion project provides training or technical support **to other members of the regulated community** to:

* identify, achieve and maintain compliance with applicable statutory and regulatory requirements;

* avoid committing a violation with respect to such statutory and regulatory requirements; or

* go beyond compliance by reducing the generation, release or disposal of pollutants or consumption of natural resources beyond legal requirements or limits.

Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements which were violated and where DEP has reason to believe that compliance in the sector would be significantly advanced by the proposed project.

If the regulated entity lacks the experience, knowledge or ability to implement the project itself, DEP will, within a consent order, require the regulated entity to:

* contract with an appropriate expert to develop and implement the compliance promotion project;

* submit a project design to DEP for approval; and

* certify the results upon completion of the project.

Acceptable projects may include, for example, producing or sponsoring a seminar directly related to correcting widespread or prevalent violations within the regulated entity's industrial sector.

F. PUBLIC HEALTH

A public health project provides diagnostic, preventative and/or remedial components of human health care which are related to the actual or potential damage to public health caused by the violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment and rehabilitation therapy.

Public health SEPs are acceptable only where the primary beneficiary of the project is the population that was harmed or put at risk by the violations.

G. PROJECTS WHICH ARE NOT ACCEPTABLE AS SEPS

Except for projects which meet the specific requirements of one of the categories enumerated above, the following are examples of the types of projects that are not allowable as SEPs:

1. General educational or public environmental awareness projects (e.g., conducting tours of environmental controls at a facility; publishing newspaper advertisements to encourage community recycling);

2. General contribution to environmental research at a college or university for an unspecified use (e.g., monetary contribution to Environmental Sciences Department at XYZ University for use at its own discretion);

3. Conducting a project, which, though beneficial to a community, neither relates to environmental protection nor advances the goal of environmental justice;

4. Projects which are being funded in whole or in part by low-interest, federal or state loans, contracts or grants where such funding sources have been dedicated for specific purposes.

V. INCENTIVES FOR PERFORMING A SEP

Where a proposed SEP meets the basic definition of SEP, satisfies all legal guidelines, including nexus, and fits within one (or more) of the designated categories in Section IV above, DEP may exercise its enforcement discretion by providing the following incentives to encourage the performance of SEPs.

When determining a settlement of the penalty amount, DEP will consider the costs to be incurred by a regulated entity in performing a SEP, a process involving several steps.

First, DEP will calculate the full appropriate penalty, including economic benefit unless DEP determines that it is insignificant, according to the ERG and Calculation Guidance.

Second, DEP will calculate the net-present after-tax cost of the SEP (the "SEP Cost"). In order to facilitate evaluation of the SEP Cost, DEP will use the computer model, PROJECT, developed by the U.S. EPA, or other method that DEP may employ to evaluate the SEP Cost.

Third, DEP will compare the SEP Cost to the full appropriate penalty amount to determine what portion of the penalty may be mitigated by the SEP. In each case, penalty mitigation is subject to the provisions in Section VI below concerning failure to perform the SEP.

As a general rule, in consideration of performance of a SEP, DEP may mitigate the penalty amount by the entire amount of the SEP Cost, provided that:

1) the amount of mitigation may not exceed the SEP Cost; and

2) in each case DEP will either collect at least 25% of the full appropriate penalty amount, or collect the economic benefit where it is significant, whichever is greater, even where the SEP Cost may not be fully offset.

DEP may collect more than the portion of the full appropriate penalty amount described immediately above where:

* DEP must allocate significant resources to monitoring and reviewing the implementation of the SEP; or

* the SEP is likely to generate a cost savings to the regulated entity (e.g., a pollution prevention project).

VI. FAILURE OF A SEP AND STIPULATED PENALTIES

DEP will, pursuant to the terms of a consent order, require the regulated entity to pay a stipulated penalty for failure to complete a SEP satisfactorily. Stipulated penalty liability should be established as appropriate to the individual case. **At a minimum**, a consent order should require a substantial stipulated penalty of between 50 and 100 percent, or higher if appropriate, of the amount by which the appropriate penalty amount was mitigated by the SEP Cost where the regulated entity:

* fails to complete the SEP satisfactorily; or

* completes the SEP satisfactorily, but DEP finds that the regulated entity based the SEP Cost on material misrepresentations.

All or part of the stipulated penalty may be waived if the regulated entity made a good faith and timely effort to complete the SEP successfully.

The determinations of whether the SEP has been satisfactorily completed (i.e., pursuant to the terms of the agreement) and whether the regulated entity has made a good faith, timely effort to implement the SEP is in the sole discretion of DEP.

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